IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 76-60

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DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AND MARK WHITE, SECRETARY OF THE STATE OF TEXAS,
Petitioners,

V.

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
Respondents.

* * *

BRIEF FOR THE PETITIONERS

* * *

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OPINION BELOW

The Opinion of the United States Court of Appeals for the District of Columbia is reported at 535 F.2d 1259.

JURISDICTION

The Opinion of the United States Court of Appeals for the District of Columbia was entered on April 19, 1976. The Petition for Certiorari was filed on July 16, 1976, and was granted on December 6, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. §§1254 (1) and 2101 (e).

QUESTIONS PRESENTED

I.

Whether the Voting Rights Act of 1965 was improperly construed and interpreted by the Bureau of the Census, the Attorney General of the United States, the federal district court and the court of appeals so that the State of Texas was erroneously determined to be subject to the Act?

II.

Whether the Bureau of Census and the Attorney General of the United States failed to properly follow their respective statutory duties as imposed and prescribed by the Congress of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Voting Rights Act of 1965, as amended, codified as 42 U.S.C. §1973, *et seq.*, forms the central core around which revolve the questions and issues presented by this brief. Pertinent sections of the Act are set out in the body of the brief.

The Tenth and Fourteenth Amendments to the United States Constitution are peripherally involved and are mentioned and discussed where pertinent to Petitioners' argument.

STATEMENT OF THE CASE

The Voting Rights Act of 1965, Public Law 89-10, as amended by Public Law 91-285 [42 U.S.C. §1973, *et seq.*] applied certain sanctions to those states or political subdivisions found to be within its scope. The test for coverage, as stated in former Section 4(b) [42 U.S.C. §1973b(b)], was:

> "The provisions of subsection (a) shall apply in any State or any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November, 1964."

The original Act did not apply to the State of Texas since Texas had no "test or device" as that term was defined in the original Act.

The 1975 amendments to the Voting Rights Act of 1965 (Public Law 94-73) amended Section 4(b) so as to read:

> "On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November, 1972."

The 1975 amendments also added Section 4(f) (3) [codified as 42 U.S.C. §1973b(f) (3)] which expanded the definition of "test or device" as follows:

"In addition to the meaning given the term under section 4(c), the term 'test or device' shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance or other materials or information relating to the electoral process including *ballots, only in the English language* where the Director of the Census determined that more than 5 per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority . . ." (Emphasis supplied.)

Thus, before the Voting Rights Act of 1975 would be applicable to the State of Texas, it was necessary that a number of determinations be made by the Attorney General or the Director of the Census, including:

(a) That five percent of the state's citizens were members of a single language minority [42 U.S.C. §1973b(f) (3)];

(b) That the state had a "test or device" which inhibited minority voting with voting procedures and voting materials produced only in the English language [42 U.S.C. §1973b(f) (3)]; and

(c) That the Director of the Census determines that less than fifty per centum of the citizens of voting age were registered on November 1, 1972, *or* that less than fifty per centum of such persons voted in the presidential election of November, 1972 [42 U.S.C. §1973b(b)].

Texas has not contested the first of the conditions since Texas had, *prior* to the amendment of the Voting

Rights Act of 1975, adopted legislation calling for bilingual materials in elections in any of its counties in which five percent or more of the inhabitants were persons of Spanish origin or descent. [See Senate Bill 165, attached as Exhibit G to the Affidavit of Mark White, attached to Plaintiffs' Original Complaint; Appendix to the Briefs, page 36, hereinafter referred to as "Appendix ____."] (However, see the discussion at page 21, *et seq.* of this brief which analyzes the conflicting methods used by Census and the Attorney General of the United States to identify persons of Spanish heritage.)

Texas, however, has consistently urged that, if the second and third requirements are properly construed and if proper figures are used, Texas is not covered. The affidavit and the testimony of Petitioner White, the chief election officer of the State, shows that as early as July 14, 1975, more than three weeks prior to the effective date of the 1975 amendments, he urged the Director of the Census to grant him a hearing so that he could ensure the use of proper statistical data. (Appendix 12, 20, 79.) Subsequently, further requests were made of the Director of the Census as well as of the Attorney General of the United States. (Appendix 12, 79.)

It has been the constant position of Texas that (1) more than fifty percent of the citizens of Texas of voting age were registered on November 1, 1972, if (a) the Bureau of the Census would not count, as citizens, aliens, both legal and illegal, and (b) if it would not count persons who by the laws of the State of Texas are not eligible to vote, including nonresidents and persons who are mentally incompetent; (2) that more than fifty percent of the persons registered to vote on November 1, 1972, did in fact vote in the presidential election of November, 1972, and that a proper interpretation of the statute calls for such a determination rather than a

determination of whether more than fifty percent of all citizens of voting age voted in the presidential election; or alternatively, (3) that the two requirements of fifty percent registered and fifty percent voting are mutually exclusive, the one intended to cover those states where voters were registered and the other intended to cover those states where voters were not registered and that Texas, having a registration law, was only required to establish that more than fifty percent of its citizens of voting age were registered; (4) that the Attorney General could not properly certify that Texas used a "test or device" since Texas eliminated any possible effect of its use of a "test or device" (English-only elections) by earlier passing its bilingual election act; and (5) that Texas was entitled to a hearing and the opportunity to present evidence to the Bureau of the Census and to the Attorney General of the United States before its determinations were made.

This suit was brought prior to the publication by the Attorney General of the United States or the Director of the Census of any findings made by them with reference to the applicability of the Act to the State of Texas. The action was brought seeking a declaratory judgment pursuant to Sections 2201 and 2202 of Title 28 of the United States Code (the matter in controversy exceeding the sum or value of $10,000 exclusive of interest and costs) with a prayer that the District Court restrain Census and the Attorney General from publishing any determination concerning the State of Texas in the Federal Register pending final resolution of the issues presented by this suit.

The suit was filed on September 8, 1975. On September 12, the Honorable Gerhard Gesell, United States District Judge for the District of Columbia, heard Plaintiffs' Motion for Temporary Restraining Order. The Court, at the conclusion of the evidence,

issued its oral ruling, finding that there was a genuine case or controversy over which it had jurisdiction, "both because of the nature of the Federal question and ... the authority presented to the Court in the Declaratory Judgment statute," but denying all relief to Plaintiff-Petitioners. (Appendix 142.) The Court granted Defendants' Motion for Summary Judgment, without notice of any setting or following the other procedures called for by Rule 56 of the Federal Rules of Civil Procedure, and dismissed the Complaint. (Appendix 151.)

Plaintiff-Petitioners appealed the Judgment to the United States Court of Appeals for the District of Columbia. That Court affirmed the Judgment on April 19, 1976, and review was then sought in this Court.

SUMMARY OF THE ARGUMENT

The Voting Rights Act, if properly construed and interpreted by the Bureau of Census, the Attorney General of the United States, and the Courts, in accordance with established rules of statutory construction, could not apply to the State of Texas.

Moreover, the Voting Rights Act was improperly *applied* by Census and the Attorney General so as to bring Texas within the coverage of the Act.

ARGUMENT

The determinations made by Census and the Attorney General of the United States, as ratified by the courts below, have required the submission of over five thousand Texas statutes, rulings and ordinances to the Attorney General for his approval or disapproval. Such submissions, from every level of Texas government, have required the expenditure of thousands upon thousands of man-hours in the preparation and

handling on the part of public officials in Texas. This expenditure of time is coupled with the substantial financial expenditure also necessitated by these submissions. The governing processes of Texas and its subdivisions have been made more costly and in some cases brought to a standstill.

The extraordinary power given to the federal executive under the Voting Rights Act over the governmental functions of a covered state must be carefully applied under the congressionally sanctioned provisions of the Act and within the limits on congressional power imposed by the doctrine of federalism.

The federal district court and the court of appeals erred in upholding the determinations made by Census and the Attorney General, which applied the provisions of the Voting Rights Act to Texas, for two reasons:

I. THE THRESHOLD STATUTORY PROVISIONS USED TO TRIGGER THE INCLUSION OF A STATE WITHIN THE AMBIT OF THE VOTING RIGHTS ACT WERE ERRONEOUSLY INTERPRETED BY THE COURTS BELOW.

A. *Census and the Court Below Misinterpreted the Statutory Duty of Census in Determining Coverage by the Voting Rights Act.*

As a prerequisite to the inclusion of a state within the coverage of the Voting Rights Act, the Bureau of the Census, acting under the authority of 4(b) of the Act [42 U.S.C. §1973b(b)], must determine:

> "that less than 50 per centum of the persons of voting age were registered on November 1, 1972,
>
> or
>
> "that less than 50 per centum of such persons voted in the presidential election of November, 1972."

As interpreted by Census and Justice (and the courts below), only the last clause is given effect, and the first clause is disregarded since the percent of those voting could never be greater than the percent of those registering, absent illegal voting by unregistered voters. No logical, legal reason exists for indulging in such an interpretation.

The most basic and fundamental rule of statutory construction requires an interpretation that gives meaning and effect to every word, clause and sentence of a legislative enactment. *United States v. Menasche*, 348 U.S. 528 (1955); 2A Sutherland, *Statutory Construction*, §46.06 (4th Ed. 1973).

An interpretation which satisfies this elementary rule of construction would require Census to determine that less than fifty percent of the citizens of voting age were registered to vote. If there were fewer than fifty percent, the determination by Census is complete; and a state is included within the terms of the Voting Rights Act if Justice makes the further required determination that the state has a "test or device" "for the purpose or with the effect of denying or abridging the right to vote..." If more than fifty percent of voting age citizens are registered, then Census must make the further finding: did "less than fifty percent of such persons" (i.e., those registered to vote) vote in the presidential election of November, 1972? If less than fifty percent of the

registered voters actually voted, then inclusion within the Act is indicated if the further, required determination by the Attorney General with respect to the state's "test or device" is made. If more than fifty percent voted, then there can be no coverage under the Act.

In 1972, Texas had 7,514,343 citizens of voting age (a Census figure disputed by Appellants but accepted arguendo as true here). (Appendix 156.) Five million two hundred thousand persons registered to vote in that same year (Appendix 83), or roughly sixty-eight percent of the "citizens of voting age." In the November, 1972, presidential election, 3,472,714 persons voted, roughly sixty-seven percent of those persons registered to vote. (Appendix 156.)

Alternatively, the fifty percent registered or fifty percent voting clauses could have been intended by Congress to provide alternative tests where some states have voter registration laws and others do not. The first part of the clause--did fifty percent register--would serve to include or exclude states with voter registration laws from coverage. The second portion of the clause--did fifty percent vote--would be applicable only where a particular state has or had no registration law.

Either of the suggested interpretations is more logical and more in keeping with the rules of statutory interpretation than that adopted by Census and Justice, and either interpretation suggested would exempt Texas from coverage under the Voting Rights Act.

Indeed, the court of appeals in its opinion below initially indicated agreement with Petitioners' first-suggested interpretation (to give effect to the entire sentence setting out the duties of Census) where the court observed at page 24 of its opinion:

> "At the outset, appellants would seem to have the better argument. It is a rule of statutory construction that legislative enactments be so construed as to give effect to all parts."

However, the court of appeals then rejected this elementary canon of construction and erroneously, by and through its application of legislative history, decided that Congress had intended only the second clause (a determination of whether fifty percent of persons of voting age did vote in the applicable presidential election) to be operative and to provide the standard for inclusion or exclusion. That court pointed to the colloquy during Congressional hearings when the Attorney General and the Director of the Census indicated that the first clause of the statute (a determination of the number of voting registrants) would be ignored. The court then assumed that this interpretation, made not by Congress but by witnesses appearing before the Congress, must be correct and should be followed by the courts. (The court of appeals admitted that if Petitioners' argument was accepted as correct, Texas would not be covered by the Voting Rights Act.)

However, the Congressional discussion of and the reference to the purported meaninglessness of the first clause (percentage of eligible voters registering to vote) *and* the continued inclusion of the first clause, suggest that Congress *intended that the first clause have meaning;* otherwise the clause would have been stricken from the proposed legislation. Certainly, in the context of the Congressional discussions, this interpretation that the first clause have vitality and meaning is more sensible; and the legislative history of the Voting Rights Act supports Petitioners' position that both clauses must have meaning. Under *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), this Court would seemingly agree

with Petitioners' contention inasmuch as the Court speaks of "two findings" which Census must make. 383 U.S. at 317. (Indeed, it would be difficult, if not impossible, for Congress to adopt Petitioners' interpretation of the statute given the reasoning of the courts below. If Congress had intended that Census first determine the percentage of voters "registered," how could that legislative body have done so? No clearer language could have been used, except possibly to add, "We, the Congress, really mean that the first clause is to be given force and effect; please give heed, Census and the courts.")

Moreover, there is a serious question as to whether the statutory construction tool of examining the legislative history should have been used in this case. This disputed statutory language is unambiguous to the literate American, and there is no place for the use of interpretative legislative history unless there is statutory ambiguity. *Caminetti v. United States*, 242 U.S. 470 (1917); *Barber v. Gonzales*, 347 U.S. 637 (1954). The desirability of giving effect to the words of a statute rather than to the uncertain intent of the legislative body in enacting legislation (especially here where legislative history can be said to support either Petitioners' view or to the interpretation announced by the court below) is illuminated by the preference expressed for deciding the meaning of statutory language

> ". . . by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. *That process seems to me not interpretation of a statute but creation of a statute.*" (Emphasis added.)

United States v. Public Utilities Commission of California, 345 U.S. 295, 319 (1953), Mr. Justice Jackson concurring. See also *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Legislative history apparently should have validity as an interpretative tool when it supports "the plain language" of a statute or, as indicated earlier, when the statutory language is not "plain"but is ambiguous. *Chandler v. Roudebush*, ___ U.S. ___ , 96 S.Ct. 1949 (1976).

This rewriting of the Voting Rights Act by Census, the Attorney General and the courts below should not be permitted, and this Court should give meaning to the entire statutory injunction to Census. Such a correct focus requires a conclusion that Texas is not within the operation of the Voting Rights Act.

B. *The Attorney General of the United States and Courts Below Misinterpreted the Statutory Duty of the Attorney General in Determining Coverage of the Voting Rights Act.*

In making his required determination to trigger the coverage of Texas by the Voting Rights Act, the Attorney General merely ascertained that Texas had a "test or device," i.e., English-only elections as provided for by Section 4(b). No consideration was given to the statutory requirement that

> "[N]o State . . . shall be determined to have

> engaged in the use of tests or devices . . . if . . . the continuing effect of such . . . (use) has been eliminated and . . . there is no reasonable probability of their recurrence in the future." (Section 4(d) of the 1965 Act.)

If the Attorney General had given effect to this provision, he *could not* have made the requisite determination that Texas used a "test or device."

Certainly with the passage of the Texas bilingual election act, the consequence of English-only elections has been effectively "eliminated," and there is no "probability" of English-only elections in the future. (See Texas Acts 1975, 64th Leg., page 511, Ch. 213, codified as Article 1.08a, Texas Election Code.)

Moreover, Texas has not "engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race and color" [Section 4(d) of the Voting Rights Act, 42 U.S.C. §1973b(d)]. It surely cannot be said that Texas instituted English-only elections in 1845 with the purpose of denying the right to vote since English-only elections were the *only* type of elections held in 1845 by *all* then-existent states. Additionally, the use of English-only elections has not been demonstrated to have had an appreciable effect on the voting of Spanish-surnamed persons. For example, in the year 1974 (an off-presidential election year) seventy-five percent of eligible voters registered to vote in Texas. (Appendix 17.) In those counties having a population with over fifty percent persons of Spanish-surname, seventy-two percent of eligible voters registered. (Appendix 17.) In addition, there was only .45 of one percent less voter turnout in the high Spanish-surname counties than in counties with a smaller representation of Spanish-surnamed individuals. (Appendix 17.) Furthermore, in

the over fifty percent Spanish-surnam counties, there was actually a greater percentage of *registered* voters who turned out to vote, than in counties with less than five percent Spanish-surname population (Appendix 17, 97.)

Certainly, the foregoing figures rather conclusively demonstrate that there was and is no showing here of discrimination in voting by Spanish surnamed persons.

Indeed, the representative of the Attorney General of the United States, in testifying before Congress during consideration of the Voting Rights Act Amendment of 1975, stated that evidence did not exist justifying the inclusion of Texas within the coverage of the Act. (Appendix 18.)

Like the Attorney General, however, the court of appeals concluded that Section 4(d) of the Act, providing linguistic calipers for the measuring and determination of certification by the Attorney General of the use of a "test or device," was inapplicable. The court held that the limiting factors of Section 4(d) were intended to apply only when a state has instituted a Section 4(a) suit to terminate coverage. However, Section 4(d) applies to all of Section 4 and the court's interpretation is erroneous when the statute is read in its entirety.

Section 4(a) does provide, as the court of appeals noticed, for termination-of-coverage (or bailout) suits by a state. More critically, Section 4(a) is the general operative part of the entire Section and provides in part that:

> "no citizens shall be denied the right to vote because of his failure to comply with any test or device in any state . . ."

Section 4(b) then provides, in pertinent part, that the Attorney General shall determine whether a state has used "any test or device."

Section 4(c) defines a "test or device" as does Section 4(f) (3) which includes the English-only language election within the definition of "test or device."

Next, Section 4(d) *further defines* the term "test or device" by setting out circumstances which must be considered and decided by the Attorney General *before* he can certify that a state has engaged in the use of a "test or device." No test or device can be certified as having been used by a state if

> "(1) the incidents have been few . . . and have been corrected by State . . . action,
>
> "(2) the continuing effect of such incidents has been eliminated, and
>
> "(3) there is no reasonable probability of their recurrence in the future."

Notice must be taken that Section 4(d), containing the standards for determining whether a "test or device" has been used, begins by stating:

> *"For the purposes of this section . . ."* (Emphasis added.)

This introductory phrase can *only* mean that the 4(d) qualifying factors apply to the whole section, including the 4(b) determination of "test or device" and not merely to 4(a) as held by the court of appeals.

It thus seems grammatically inescapable that the take-out modifiers of Section 4(d) *must be used* by the Attorney General in making his *determination* of coverage under Section 4(b).

As demonstrated above, then, the Attorney General in determining whether Texas used a "test or device"should have considered the following:

(1) Whether Texas, in the past, used English-only elections (the finding must, of course, have been that Texas did uniformly hold such elections);

(2) Whether incidents of discrimination have been few in number and whether the incidents have been corrected by state action (the new Texas Bilingual Election statute, Texas Election Code Ann., Art. 1.08a, has accomplished the required correction);

(3) Whether the continuing effect of English-only elections has been eliminated (again, the Texas Bilingual Election statute has satisfied this requirement); and

(4) Whether there is no reasonable likelihood of recurrence of any problem presented by English-only elections in the future (and again, of course, the Bilingual Election statute ensures against recurrence).

This Court can and should correct the erroneous interpretation of Section 4(d) of the Voting Rights Act, indulged in by the Attorney General and approved by the court below, so as to require the application of 4(d) to any determination by the Attorney General in determining coverage by the Act. The record supports a determination that the bilingual voting now existent removes Texas from the coverage of the Act. At the very least, a remand should be ordered requiring that the Attorney General properly apply and take into account the provisions of Section 4(d).

However,

II. EVEN IF PETITIONERS' STATUTORY CONSTRUCTION ARGUMENTS

ARE REJECTED BY THIS COURT, THE BUREAU OF CENSUS AND THE ATTORNEY GENERAL OF THE UNITED STATES FAILED TO FOLLOW THEIR RESPECTIVE STATUTORY DUTIES AS IMPOSED BY THE CONGRESS OF THE UNITED STATES IN THE VOTING RIGHTS ACT.

A. *The Refusal of the Director of Census and the Attorney General to Grant Some Sort of Hearing or Forum to Permit Texas to Submit Evidence and Argument on the Nonapplicability of the Voting Rights Act to Texas was Arbitrary and Invalid.*

As early as July 14, 1975, Texas Secretary of State Mark White began attempts to secure an audience before the Director of the Census and the Attorney General in order to submit evidence and present his contentions as to the coverage or noncoverage of Texas by the Voting Rights Act Amendment of 1975 (it had become evident at that time that the Amendment would become effective within a short time). (Appendix 12, 20, 79.) Additionally, repeated requests for some sort of hearing were made by both the Secretary of State and the Governor of Texas. (Appendix 12, 79.)

On September 2, 1975, White was advised by telegram from J. Stanley Pottinger that Census would "provide . . . the opportunity . . . to provide any data and supporting documentation relevant to his (Census) determination . . . (and) your (White's) data will be received and considered fully and fairly." (Appendix 13, 79.) A meeting was scheduled for September 5, 1975.

(Appendix 14, 79.) While in preparation for the promised hearing, the Secretary of State of Texas learned that Census had already determined the issues to be discussed at the hearing. *Because*, on September 4, 1975, the Bureau of Census issued a *press release*, without any prior notice to Texas, announcing that Census had determined that Texas was covered by the Voting Rights Act. (Appendix 14, 80.)

The scheduled, but abortive and then futile, September 5 meeting was nevertheless held, at which time White presented his views and documents. He also learned that the Director of Census in arriving at the number of "citizens of voting age" in Texas on November 1, 1972, employed the following procedures:

(a) Disenfranchised persons, such as persons convicted of felonies and adjudicated lunatics were included in the tabulation as were nonresidents, military personnel and students (Appendix 15, 90, 156);

(b) No consideration was given to the statutory language requiring the determination of whether "less than 50 per centum of the citizens of voting age were registered on November 1, 1972" (Appendix 14, 156);

(c) No current or 1972 figures for the number of aliens in Texas as compiled by and available from the United States Bureau of Immigration and Naturalization were used to exclude such aliens from "citizens of voting age" (Appendix 15, 89, 156); and

(d) A separate standard was used in the case of Texas (and in four other states) to determine "persons of Spanish heritage" so that all persons with Spanish surnames were held to be includable without regard to whether they have English language capability or even whether they can speak or read the Spanish language

(Appendix 15, 28, 92).

A meeting was later held before members of the United States Attorney General's staff, but White was not permitted to offer evidence, comments, criticisms, or arguments as to the applicability of the Voting Rights Act to Texas. (Appendix 93, 105-107.) The Attorney General never offered any sort of hearing or audience to Texas before determining that it was covered by the Act. (Appendix 14, 24, 80.)

Surely some opportunity to demonstrate noncoverage and some elements of fair play must be offered and accorded to a state. Anything less would raise serious constitutional problems concerning the Act because the means chosen by Congress to protect voting rights would not satisfy the Fourteenth Amendment "appropriate legislation" requirement.

It should be recognized that this case presents a different posture than does the case of *South Carolina v. Katzenbach*, since Texas has consistently challenged (before publication in the Federal Register) the figures used by Census and the interpretation of the Act by both Census and the Attorney General. And, unlike the situation in *Katzenbach*, there has arisen a "plausible dispute." 383 U.S. at 333. If the determination made by Census and the Attorney General were not the "objective statistical determinations" nor "routine analysis of state statutes" *(Katzenbach*, 383 U.S. at 333) as Petitioners have consistently urged, then some opportunity for a hearing before these agencies must be required.

Some means simply must be provided for a sovereign state to challenge the interpretations of the Act used by Census and the Attorney General before some administrative officer (not Congress) rules in such fashion as to trigger coverage.

The need and constitutional necessity for some form of hearing is cogently illuminated by the discussions which follow.

B. *The Anomolous and Conflicting Methods Used by Census on Instructions of the Attorney General to Determine Persons of Spanish Heritage Illustrates the Arbitrary Application of the Voting Rights Act by the Attorney General.*

While Texas has not complained of the determination made by Census--that "more than five per centum of its citizens of voting age . . . are members of a single language minority" (an initial finding which must be made to trigger coverage where the only "test or device" employed is the holding of English-only elections [Section 4(f) (3)], the manner used to determine the minority, persons of Spanish heritage in the case of Texas, aptly illustrates the arbitrary application of the Voting Rights Act by the federal executive arm.

In determining the five percent language minority, the Attorney General instructed Census as follows:

> "The Act does not define the term 'persons of Spanish heritage.' The legislative history indicates that the Director of the Census is to identify such persons as: 'persons of Spanish language' in 42 states and the District of Columbia; 'persons of Spanish language' as well as 'persons of Spanish surname' in Arizona, California, Colorado, New Mexico, and Texas; and 'persons of Puerto Rican birth or parentage' in New Jersey, New York, and Pennsylvania."

(Exhibit F to the Affidavit of Mark White, attached to Plaintiffs' Original Complaint, Appendix 28.)

If "persons of Spanish heritage" had been calculated for Texas, as it was in "42 states and the District of Columbia," by identifying "persons of Spanish language" only, then it is very probable that Texas would not have been included within the Voting Rights Act by virtue of the five percent language minority test--the first finding to be made before any of the other triggering elements are applied.

Certainly more than five percent of Texas' citizenry has Spanish surnames. But there is also the strong probability that less than five percent of Texas' citizens cannot speak English. Many of Texas' Spanish-surnamed citizens are descendents of persons who were in Texas before the English speaking peoples settled in the state. And most of the Spanish-surnamed citizens have been born in Texas and have been speaking, reading and writing English since birth or early childhood.

Surely, the Voting Rights Act, *as applied* by the Attorney General and Census in determining the five percent language minorities, cannot be said to be appropriate legislation for the protection of civil rights when different standards are set for the several states. Taken with the other irrationalities indulged in by Census and the Attorney General, the inappropriateness of the Act, *as applied*, is starkly illuminated.

C. *The Irrationality of the Determination of "Citizens of Voting Age" by Census Casts Doubt Upon the Validity of the Voting Rights Act as Applied.*

Several areas of dispute with regard to the determination made by Census have been noted above. The inclusion of disenfranchised voters and nonresident military personnel and students in the citizenship of voting age figure may be explained by the statutory words "citizens of voting age" (all of these questionable included persons may be *citizens* for some purposes). However, the manner of excluding aliens and the ignoring of part of the statutory requirements for inclusion within the Act (the failure to give any effect to the statutory injunction to count the number of citizens registered) present a strong suggestion of administrative irrationality and capriciousness.

According to Census (Appendix 156), the number of citizens of voting age was calculated as follows:

> "The fundamental method used by the Census Bureau in arriving at its determinations of political jurisdictions in which less than 50% of the citizens of voting age population voted in the November 1972 Presidential election involves (a) updating the April 1, 1970, 18 years of age and over population figures to November 1, 1972, (b) subtracting the number of aliens of voting age, and (c) dividing the result by the total number of votes cast in the jurisdiction in the November 1972 presidential election."

Using this formula, Census produced these figures:

Persons of Voting Age in Texas on 11/1/72	7,655,000
Less Aliens of Voting Age in Texas on 11/1/72	140,657
Citizens of Voting Age in Texas on 11/1/72	7,514,343

(Appendix 156.)

The figure for the number of aliens in Texas as of November, 1972, which includes both legal and illegal aliens, is patently erroneous, and in arriving at the number Census ignored the more accurate figures compiled by the Bureau of Immigration and Naturalization, figures which show that there were 263,200 legal aliens in Texas in 1972 (not all of voting age, however) and that 209,912 illegal aliens were deported from Texas in 1972. (Appendix 87, 88; Plaintiffs' Exhibit No. 1.) Plaintiffs' Exhibits 3, 4, and 5 (not admitted but a part of the record on appeal in the court below) further indicated that for every alien apprehended in Texas, at least four times that number were living in Texas and were undetected, approximately 1,000,000 aliens. Use of this figure would have placed Texas without the coverage of the Act (Appendix 87, 88, 156).

This ratio of unapprehended illegal aliens to apprehended illegal aliens, four to one, is borne out by the recent study made under contract to the Bureau of Immigration and Naturalization, denominated as "Final Report - Basic Data and Guidance Required to Implement a Major Illegal Alien Study During Fiscal Year 1976," hereinafter referred to as "Report." (This study was submitted as an Appendix to Appellants' Supplemental Brief, filed in the court of appeals and a part of the record in this Court.)

The Report indicates that there were 2,693,600 illegal Mexican nationals who were undetected in the United States in the year of 1972. (Report, page 12.) Probably one-half of the number were living in Texas, a very plausible figure when consideration is given to the fact that the length of the Texas border lying adjacent to Mexico is in excess of 900 miles while the Mexican

border along New Mexico, Arizona and California is only about 700 miles. *Rand McNally Cosmopolitan World Atlas* (1962 Ed.), pages 80, 82, 107 and 118. Moreover, the larger Mexican population centers lie below the Texas border enhancing the possibility that the major influx of illegal aliens is into Texas.

However, to use overly conservative figures, a reasonable calculation of aliens in Texas in 1972 would be:

Legal aliens:	
263,000 estimated to include only 1/3 persons of voting age or	87,667
Illegal aliens apprehended:	
209,912 of which it may be estimated that 50,000 were apprehended twice, or a figure of	159,912
Illegal aliens not apprehended: 2,693,600 for the United States of which it may be estimated that 1/4 were living in Texas, or a figure of	673,400
Total aliens in Texas by the most cautious estimates	920,979

If this more-than reasonable figure had been used by Census, then the citizens of voting age in Texas in November of 1972 would have been:

Persons of voting age (by Census figures)	7,655,000
Less aliens	920,979
Citizens of voting age	6,734,021

Then, even under the coverage calculations of Census and Justice (which improperly ignored the number of citizens registered to vote), there would have been over fifty-one percent of the citizens of voting age in Texas who voted in the November, 1972, presidential election (3,472,714 persons voting out of 6,734,021 citizens of voting age)--and *Texas would not have been included within the embrace of the Voting Rights Act.*

Appellants do not say the foregoing figures for the number of aliens in Texas are correct (almost certainly there were more aliens than the calculated figure), but the analysis does rather conclusively demonstrate that the figure for aliens used by Census is manifestly ridiculous and constitutes an abrogation of the statutory duty imposed by Congress to "*determine* the *citizens* of voting age" (emphasis added) as a step in the process of determining Voting Rights Act coverage.

And more importantly, the questionable nature of the figures used by Census to trigger the coverage of Texas, emphasizes the need for a hearing of some character.

D. *The Decision by the Attorney General Subjecting Texas to the Voting Rights Act was Erroneous, Irrational and Arbitrary.*

Petitioners have asserted above that the Attorney General erroneously applied the triggering tests of the Voting Rights Act to include Texas within the coverage of the Act by failing to measure the Texas "test or device" (English-only elections) with modifying factors contained in Section 4(d), i.e., the elimination of the continuing effect of such test and the lack of any reasonable probability of recurrences in the future.

Again, with respect to the contention of Texas that

such factors should have been considered before a finding that a "test or device" was used, no hearing was accorded to Texas to urge its no "test or device"theory.

The failure of the Attorney General to hold a hearing before making a determination, which has pitchforked Texas and its political subdivisions into the morass of bureaucratic determinations, purportedly measuring the effect of its statutes and ordinances upon voting, demonstrates the "(in) appropriateness" of the Voting Rights Act, as interpreted, for the protection of civil rights.

Texas, of course, concedes the power of Congress to guarantee civil rights, including the right to vote, by enacting "appropriate legislation." However, here the Attorney General refuses to give fair consideration to a position taken by a state, and legislation which will permit such arbitrariness cannot be said to be "appropriate." As noted by Mr. Justice White (in another voting rights context) in his dissent in *Georgia v. United States*, 411 U.S. 526, 543 (1973),

> "I cannot believe, however, that Congress intended to visit upon the States the consequences of such uncontrolled discretion in the Attorney General."

And in the same case, 411 U.S. at 545, Mr. Justice Powell, dissenting, said,

> "As a minimum, assuming the constitutionality of the Act, the Attorney General should be required to comply with it explicitly and to invoke its provisions only when he is able to make an affirmative finding rather than an ambivalent one."

The executive officials, armed with the administration of the laws, should be acutely aware that

they must perform their duties fairly and cautiously and avoid the slightest tinge of arbitrariness. Otherwise, in the federal-state, federalism context, the legislation will be deemed to be "(in) appropriate."

The determinations by Census and by the Attorney General, in triggering Voting Rights Act coverage of Texas, ignored the law, were unreasonable and cannot form the basis for coverage. And if the law intended such precipitate actions by Census and the Attorney General, the legislation would become "inappropriate" and would be without the power of Congress to enact. *National League of Cities v. Usery*, ___ U.S. ___, 96 S.Ct. 2465 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Younger v. Harris*, 401 U.S. 37 (1971).

Thus, the interpretation and application of the Voting Rights Act by Census and the Attorney General in this case must be held to be improper to save the constitutionality of the Act. Such interpretations and applications cannot have been intended by Congress. Therefore, remand should be ordered by this Court with instructions that Census and the Attorney General perform their statutory duties in a manner consistent with "Our Federalism." *Younger v. Harris, supra.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below be reversed.

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that the above and foregoing Brief for the Petitioners has been served on the Defendants-Appellees by hand delivering three copies of said brief on this the ___ day of January, 1977, to: The Solicitor General of the United States, c/o Ms. Cynthia Atwood, Attorney, Department of Justice, Washington, D. C. 20530.

LONNY F. ZWIENER
Assistant Attorney General

No. 76-60

In the Supreme Court of the United States

OCTOBER TERM, 1976

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, ET AL., PETITIONERS

v.

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–40) is reported at 535 F.2d 1259. The oral ruling of the district court (Pet. App. B–1 to B–9) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C–1) was entered on April 19, 1976. The petition for a writ of certiorari was filed on July 16, 1976, and was granted on December 6, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Director of the Census and the Attorney General properly construed the coverage formula of Section 4 of the Voting Rights Act of 1965, as amended by Pub. L. 94–73, 42 U.S.C. (and Supp. V) 1973b, in determining that the State of Texas is subject to that Section.

STATUTES INVOLVED

Pertinent portions of Section 4 of the Voting Rights Act of 1965, 79 Stat. 438, as amended by Pub. L. 94–73, 89 Stat. 400, 42 U.S.C. (and Supp V.) 1973b, are set forth in the Appendix to the Brief for the Respondents in Opposition (1a–6a).

In addition, 28 U.S.C. 2282, prior to its amendment,[1] provided that:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[1]This section was repealed by Section 2 of Pub. L. 94–381, 90 Stat. 1119, enacted on August 12, 1976. However, Section 7 of Pub. L. 94–381 provides that the repeal "shall not apply to any action commenced on or before the date of enactment." The instant action was commenced by the filing of a complaint on September 8, 1975 (A. 1). See note 10, *infra*.

STATEMENT

A. PROCEDURAL HISTORY

On September 8, 1975, in the District Court for the District of Columbia, petitioners, the Governor and Secretary of State of Texas, instituted this action, pursuant to 28 U.S.C. 1331 and the Declaratory Judgment Act, 28 U.S.C. 2201 *et seq.*, against the Attorney General of the United States, the Director of the Census, and other federal officials. Petitioners sought interlocutory injunctive relief to restrain the defendants from publishing in the Federal Register determinations as to the coverage of Texas under Section 4 of the Voting Rights Act of 1965, as amended by Pub. L. 94–73, 42 U.S.C. (Supp. V) 1973b, and a "declaratory judgment determining how and under what circumstances the determinations * * * should be made" (A. 10–11). Petitioners contended that the Attorney General and the Director of the Census incorrectly determined that the State of Texas became subject to Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b, by virtue of the 1975 amendments thereto.[2]

[2] Section 4, as amended by the Act of August 6, 1975, Pub. L. 94–73, 89 Stat. 400–402, provides that a jurisdiction shall be subject to certain remedial provisions of the Act if the Director of the Census and the Attorney General, respectively, determine that more than five percent of the voting age citizens of the jurisdiction are members of a single language minority, and that the jurisdiction provided any election materials or information only in English as of November 1972; and if the Director of the Census

Petitioners requested that the court declare whether they were entitled to a hearing prior to the determination by the Director of the Census and the Attorney General that the State of Texas was covered by Section 4 of the Act (A. 9); whether the Director of the Census had used inaccurate data in computing the number of citizens of voting age in Texas (A. 7); whether the Director of the Census misconstrued the phrase "citizens of voting age" (*ibid.*); whether the Director had also misconstrued the 50 percent portion of the Section 4 coverage formula (*ibid.*); whether the definition of "test or device" enacted in 1975 could be "retroactively applied" to 1972 (A. 7–9); and, finally, whether the Attorney General had misconstrued Section 4(d) of the Act (A. 9–10).

The complaint did not allege that the challenged provisions were unconstitutional, petitioners did not request that a three-judge district court be convened under 28 U.S.C. 2282, and at the hearing before the district court petitioners stated that they were not making a constitutional argument (A. 99–100; see also A. 112 and note 10, *infra*, p. 12).

Respondents opposed petitioners' motion for a preliminary injunction and moved to dismiss the suit on the ground that the court lacked jurisdiction to review the determinations made under Section 4(b).[3] The single-judge district court granted summary judgment in favor of the respondents,[4] and the court of appeals unanimously affirmed.

determines that less than 50 percent of the citizens of voting age were registered on November 1, 1972, or that less than 50 percent of citizens of voting age voted in the presidential election of 1972.

B. THE FACTS

After Congress enacted Pub. L. 94–73 on August 6, 1975, the Director of the Census and the Attorney General prepared to make the determinations required by Section 4(b) of the Voting Rights Act of 1965, as amended. Between July 14, 1975, and August 28, 1975, the Secretary of State of Texas requested that the Director of the Census and the Attorney General afford the State a hearing prior to the publication of any determinations, to allow the State to present evidence which the Secretary of State alleged was relevant to the question whether Texas should be covered by the Act (A. 20–23, 25–26; Pet. App. A–5). Assistant Attorney General J. Stanley Pottinger notified the Secretary of State that although the statute did not provide for a hearing regarding the determinations, the Bureau of the Census would provide the State with an opportunity to provide data and supporting documentation rele-

[3] Section 4(b) provides in part that:

"A determination or certification of the Attorney General or of the Director of the Census under this section * * * shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

[4] The court, with agreement of all parties, treated respondents' motion to dismiss as a motion for summary judgment (A. 71–72; Pet. App. A–7 and n. 16).

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vant to the Census determinations and that such data would "be received and considered fully and fairly" (A. 13–14; Pet. App. A–5). A meeting was scheduled for September 5, 1975 (A. 79; Pet. App. A–5).[5]

At this meeting, Bureau officials informed the Secretary of State that they would evaluate any evidence presented. Meyer Zitter, Chief of the Population Division of the Bureau of the Census, also informed the Secretary of State that Zitter would "see whether * * * any materials you have * * * would help us decide" and that "there is nothing that we have put out yet that precludes us from making changes * * *." Zitter said that "even if it goes in the Register, if we find that on the basis of evidence that our arithmetic is wrong or there is a better set of data available, we are not precluded from making changes * * *" (A 108–109; Pet. App. A–17 n. 34). However, the Secretary of State presented no facts which the Bureau believed required a change in its tentative determination regarding Texas (A. 159; Pet. App. A–6).

In the district court, Mr. Zitter described by affidavit the methods the Bureau used in making the determination that less than 50 percent of the citizens of voting age in Texas voted in 1972 (A. 156):

[5] On September 4, 1975, the day before the scheduled meeting, the Bureau of the Census issued a press release which "identified five States [including Texas] * * * which fall under the 1975 amendments to the Voting Rights Act * * *" (A. 206). As the press release stated, the Attorney General had not yet made the determination required by section 4(b) as to whether Texas

1. The fundamental method used by the Census Bureau in arriving at its determinations of political jurisdictions in which less than 50% of the citizens of voting age population voted in the November 1972 Presidential election involves (a) updating the April 1, 1970, 18 years of age and over population figures to November 1, 1972, (b) subtracting the number of aliens of voting age, and (c) dividing the result by the total number of votes cast in the jurisdiction in the November 1972 Presidential election. This computation provides the estimated percentage of "citizens of voting age who voted" and is the basis of our determination as to whether less than 50% voted. The votes cast figures used are the official tabulations provided by state governments.

2. Using the above-described formula, the Census Bureau has determined that less than 50% of the citizens of voting age in Texas voted in the November 1972 Presidential election. The figures used in the computation were as follows:

State of Texas:

	Estimates
Voting Age Population as of 11/1/72—	7,655,000
Aliens of Voting Act as of 11/1/72—	140,657
Citizens of Voting Age as of 11/1/72—	7,514,343
Votes Cast as of 11/72—	3,472,714
Percent Citizens of Voting Age Voting—	46.2%

employed a "test or device" in 1972 (A. 207). In addition, the Director of the Census had not yet made his official determination as to coverage. See note 7, *infra*.

The sources of data used to make the Section 4(b) Census determinations were the responses to the 1970 Census Questionnaire, published Census data, and the official number of votes cast in Texas, which was provided to the Bureau of the Census by the State of Texas (A. 156–158).

C. THE DISTRICT COURT'S ORDER

The district court ruled that, despite the clause in Section 4(b) precluding review of the determinations made under that Section, the court had "narrow" jurisdiction to make such inquiry as was necessary "to determine whether or not the interpretation given by the Director of the Census to the statute is rational and whether it is or is not in the large consistent with the declared congressional purpose and the legislative history" (Pet. App. B–4 to B–5).[6]

Applying that standard, the district court ruled that neither the Voting Rights Act nor the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, afforded petitioners the right to an administrative hearing, and that, with regard to each of the issues of statutory construction petitioners raised, the interpretation of the Director of the Census was "rational, consistent with the purposes and meaning of the statute and consistent with the legislative history" (Pet. App. B–5 to B–6), and "must be sustained" (Pet. App. B–7). The court declined to rule on any constitutional issues discussed by petitioners, because it

[6] Petitioners do not here challenge the scope of judicial review applied below.

lacked jurisdiction (Pet. App. B–6), and it refrained from ruling on issues raised regarding the Attorney General's determination under Section 4(b) because the Attorney General had not yet made any determination (*ibid.*).[7]

D. THE DECISION OF THE COURT OF APPEALS

The court of appeals unanimously affirmed. The court ruled first that even where, as here, Congress intended to preclude review of executive actions, "a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory authority," and that the district court had properly acted within its jurisdiction (Pet. App. A–11 to A–12). The court then reviewed and rejected each of petitioners' contentions.

The court held that, to the extent that petitioners sought to enjoin application of the Voting Rights Act on the ground that a hearing was constitutionally required, the court lacked jurisdiction because injunctive relief on such grounds may be granted only by a three-judge district court, for which petitioners had not applied (Pet. App. A–13). The court noted petitioners' apparent concession that neither the Voting Rights Act nor the Administrative Procedure Act provides for a hearing prior to the making of the

[7] The Attorney General made his determination following the order granting summary judgment in the district court. On September 23, 1975, the Attorney General and the Director of the Census published a joint determination that the State of Texas met the applicable requirements of Section 4(b) of the Act. 40 Fed. Reg. 43746.

determinations under Section 4 (Pet. App. A–12 to A–17), and held that to find such a requirement implied would be contrary to the basic purposes of the Voting Rights Act (Pet. App. A–16). In any event, the court concluded that the Secretary of State's meeting with representatives of the Bureau of the Census afforded Texas "a participation in the decision-making process under the Voting Rights Act greater than the statute requires" (Pet. App. A–17).

The court also ruled that the Director of the Census had not erred in relying on Census data to determine the number of "citizens of voting age" in Texas. The court reasoned that, although petitioners had presented statistics and estimates which might cast "some doubt upon the reliability (in an absolute sense) of the figures used by the Director" (Pet. App. A–21), petitioners had been unable to present better figures. Petitioners'—

> * * * figures are necessarily amalgams of estimates and hypotheses because there are no statistics available which provide what are assuredly completely accurate answers to the questions raised by section 4(b) of the Voting Rights Act. That being so, it is clearly the prerogative of Congress to specify one particular source for all the figures to be used, to insure quick availability and consistency. [Pet. App. A–21.]

The court therefore concluded that the Bureau had properly looked to its own statistics for data, and that, having correctly determined that the statute authorized the Director, "in his discretion, to rely

only on census data," the district court properly refused to review the Bureau's computations themselves (Pet. App. A–23 to A–24).

The court next turned to petitioners' argument that the Director of the Census misinterpreted the portion of Section 4 which requires him to determine whether—

> * * * less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or [whether] less than 50 per centum of such persons voted in the Presidential election of November 1972.

The court noted that the Director of the Census has consistently interpreted the term "such persons" in the second clause to refer to "citizens of voting age" in the first clause (Pet. App. A–24). Petitioners contended that "such persons" refers to "citizens of voting age" "registered" (Pet. App. A–25).[8] The court found petitioners' interpretation of the clause was contrary to the legislative intent, demonstrated by the history of the Act as originally passed in 1965 (Pet. App. A–25 to A–37). For example, the court found that, if petitioners' construction of this provision were correct, "many states that the Act [of 1965] was admittedly aimed at would not have been covered" (Pet. App. 26).

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[8] Under petitioners' construction of this clause, Texas would not be covered by Section 4(b) because in Texas more than half of the voting age population was registered, and more than half of the registered voters voted in the November 1972 election. On the other hand, less than half of the citizens of voting age actually voted in that election. See p. 7, *supra*.

The court also found that the Director's interpretation was supported by the testimony of the Attorney General and the Director of the Census during the Senate hearings in 1965 (Pet. App. A–29 to A–33), and by the remarks of dozens of Senators and Congressmen addressed both to the original Act and to its 1975 amendments (Pet. App. A–34 to A–37 nn. 62–69), and that it is consistent with this Court's application of the provision (Pet. App. A–36; see *South Carolina* v. *Katzenbach,* 383 U.S. 301, 330).

Finally, the court of appeals ruled that Section 4(d) [9] of the Voting Rights Act does not apply to the Attorney General's determination whether a jurisdiction is covered by Section 4. The court ruled that Section 4(d) relates only to the judicial decision, in a suit brought under Section 4(a), whether coverage should be terminated (Pet. App. A–39 to A–40).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents no constitutional attack on the Voting Rights Act amendments of 1975. Indeed, by their choice of forum and by their specific disclaimer

[9] "(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future."

in the district court, petitioners have deliberately avoided a constitutional challenge.[10]

Furthermore, petitioners' statutory arguments, although ostensibly directed at the 1975 amendments, are in fact little more than attacks on workaday interpretations of the original Voting Rights Act that have been settled for more than a decade.

Whether inadvertently or not, petitioners articulate these arguments as if they are being advanced for the first time in this litigation, with scant awareness shown for the legislative and judicial interpretations given to the Act since its enactment in 1965. Consequently, there is little if any reasoned argument showing why this Court should, at this late date,

[10] In their petition for a writ of certiorari petitioners presented the question whether "The Voting Rights Act of 1965 as Amended Is * * * Appropriate Legislation to Enforce The Privileges And Immunities Guaranteed By the Fourteenth Amendment" (Pet. 17–28). In our brief in opposition we argued that the courts below correctly held that they lacked jurisdiction to grant injunctive and declaratory relief on constitutional grounds, because petitioners had not sought the convening of a three-judge-court. Therefore, we urged that this Court should not decide the merits of petitioners' constitutional claims.

Petitioners do not present a constitutional claim in their brief on the merits. They state only that (Pet. Br. 17–18):

"Even if Petitioners' Statutory Construction Arguments are Rejected by this Court, the Bureau of Census and the Attorney General of the United States Failed to Follow Their Respective Statutory Duties as Imposed by the Congress of the United States in the Voting Rights Act."

Whatever constitutional claims petitioners may once have had may not properly be raised here. First, constitutional challenges to federal statutes brought prior to August 12, 1976, as this suit

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reverse the settled interpretation of this twice-reenacted remedial legislation.

The Voting Rights Act of 1965 was adopted in response to years of unsuccessful attempts by private litigants and by the federal government to secure the right to vote against discrimination on account of race. The Act provided that certain jurisdictions, to be determined by the operation of a coverage formula contained in Section 4, were to be subject to "a complex scheme of stringent remedies," *South Carolina* v. *Katzenbach,* 383 U.S. 301, 315, aimed at ending that discrimination. These remedies include the suspension of all literacy tests and similar voting qualifications for a period of years, 42 U.S.C. 1973b(a), the suspension of all new voting regulations and procedures pending review by the Attorney

was, were required by 28 U.S.C. 2282 to be heard by a three-judge district court. See p. 2, *supra.* Although 28 U.S.C. 2282 has been repealed by Pub. L. 94–381, the repealer statute explicitly provided that "[t]his Act shall not apply to any action commenced on or before the date of enactment." To the extent that any constitutional issues were raised below, the courts below therefore properly declined to decide them (Pet. App. B–2; A–13 and n. 29), and this Court should do so as well.

Second, not only did petitioners not allege a constitutional violation or request the convening of a three-judge court, they waived any constitutional claims they may initially have asserted. In the hearing in the district court the following colloquy occurred (A. 99):

"The COURT: * * * You have those rights under the statute which you can exercise.

"Mr. ZWEINER [Counsel for petitioners]: That is true but we say that Congress, in passing the statute, must have intended for the representatives that it chose to enforce the statute to have acted on a rational basis and that these particular standards that I have just discussed are a part of that rational basis decision making

General or a three-judge district court in the District of Columbia, 42 U.S.C. 1973c, and the assignment of federal examiners on certification by the Attorney General to list qualified applicants who then become eligible to vote in all elections, 42 U.S.C. 1973d and 1973e.

These remedies applied, in 1965, to any state or political subdivision (1) which the Attorney General determined maintained a "test or device" within the meaning of the Act on November 1, 1964,[11] and (2) in

determination that must be made. Otherwise, the statute would be unconstitutional.

"The COURT: If you have got a constitutional argument, the statute requires you to ask for a three-judge court; and you haven't done so.

"Mr. ZWEINER: I am not making that argument."

The district court noted in its oral opinion, issued on the day of the hearing, that (Pet. App. B–2):

"The issues are in one respect narrow in that this is a single-judge Court and there is no question as to the constitutionality of the statute presented or indeed attempted to be presented in these proceedings."

Because of the bar to consideration of constitutional claims and because petitioners apparently have abandoned the constitutional claims they raised in their petition, we do not address the substance of those claims here, other than to note that the constitutionality of Section 4 is firmly established, *South Carolina* v. *Katzenbach*, 383 U.S. 301, and that the legislative record provides ample justification for the 1975 expansion of the Act. See *e.g.*, "Constitutionality of proposed expansion of the Voting Rights Act," Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 1043 (1975).

[11] The 1965 Act defined "test or device" to mean any requirement that a registrant or voter—

"(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral

which the Director of the Census determined that less than 50 percent of its voting age residents were registered to vote on November 1, 1964, or voted in the presidential election of November 1964. 42 U.S.C. 1973b(b). Section 4 of the 1965 Act further provided that the determinations of the Attorney General and the Director of the Census were not reviewable in any court (*ibid.*).

Although no pre-determination hearing was provided, and although review of the coverage determination itself was prohibited, the Act provided a means by which a jurisdiction, once covered, could terminate such coverage. Under Section 4(a), a jurisdiction could "bail out" from coverage by bringing suit, at any time, in the District Court for the District of Columbia and proving that the jurisdiction had not maintained any test or device with a discriminatory purpose or effect for five years prior to the suit. 42 U.S.C. 1973b(a).

The structure of the 1965 Act thus conformed to its purposes. The determinations of the Attorney General and the Director of the Census subjected the jurisdiction to the remedial requirements of the Act without delay,[12] while the adjudication whether or not

character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

42 U.S.C. 1973b(c). The 1975 amendments expanded this definition. See text at note 14, *infra*.

[12] The Voting Rights Act of 1965 was signed into law on August 6, 1965. On August 7, 1965, Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 26 counties in North Carolina and one county in Arizona were determined to be covered by the Act. 30 Fed. Reg. 9897.

such jurisdiction had engaged in discriminatory use of tests or devices awaited a termination suit. As this Court noted in upholding the constitutionality of Section 4, the Act was designed "to shift the advantage of time and inertia from the perpetrators of the evil to its victims" (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 328).

In 1970 Congress extended the provisions of the Voting Rights Act (including Sections 4 and 5) for another five years. Application of the Section 4 formula to the 1968 presidential election brought additional jurisdictions within the Act's coverage.[13] In 1975 Congress once again extended the provisions. Pub. L. 94–73. In addition, Congress expanded the definition of "test or device" to include—

> * * * any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.[14]

The coverage formula in Section 4 was updated to include jurisdictions: (1) which the Attorney General

[13] See S. Rep. No. 94–295, 94th Cong., 1st Sess., App. B, p. 65 (1975).

[14] 42 U.S.C. (Supp. V) 1973b(f)(3). "Language minority" is defined to mean persons who are American Indians, Asian Americans, Alaskan Natives, or of Spanish heritage. 42 U.S.C. (Supp. V) 1973*l*(c)(3).

determined had maintained a test or device on November 1, 1972, and (2) in which the Director of the Census determined that less than fifty percent of the citizens of voting age were registered or voted in the presidential election of November 1972. The new definition of "test or device" to include English-only voting materials and the updating of the coverage formula to include the 1972 presidential election brought Texas (and other jurisdictions) within the Act for the first time. Such jurisdictions became subject to the remedial provisions of the Act previously described. See p. 15, *supra*.

In support of the expansion of coverage of the Act, Congress had before it extensive evidence of discrimination in voting against persons of Spanish heritage as well as blacks, particularly in the State of Texas.[15] For example, the House Report notes that:

> In 13 days of hearings and testimony from 34 witnesses, the Subcommittee documented a systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English.
>
> * * * * *
>
> The State of Texas, for example, has a substantial minority population, comprised pri-

[15] The district court noted that "Texas is on almost every page of the legislative history" (A. 80). At least seven witnesses before the Subcommittee on Civil and Constitutional Rights of the House of Representatives Committee on the Judiciary testified regarding voting discrimination in Texas. See Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 1st Sess. (1975). See also, Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. (1975).

> marily of Mexican Americans and blacks. Evidence before the Subcommittee documented that Texas also has a long history of discriminating against members of both minority groups in ways similar to the myriad forms of discrimination practiced against blacks in the South.
>
> Turnout in recent presidential elections in Texas (1960–1972) has been consistently below 50 percent of the voting age population. Indeed, the only reason that Texas was not covered by the Voting Rights Act in 1965 or by the 1970 amendments was that it employed restrictive devices other than a formal literacy requirement.
>
> * * * * *
>
> The exclusion of language minority citizens is further aggravated by acts of physical, economic, and political intimidation when these citizens do attempt to exercise the franchise. Witnesses testified that local law enforcement officials in areas of Texas patrol only Mexican American voting precincts, and harass and intimidate Mexican American voters.
>
> Much more common, however, are economic reprisals against minority political activity. Fear of job loss is a major deterrent to the political participation of language minorities. A witness from Texas indicated that an Anglo candidate who was a loan officer at the bank went to each Mexican American who had loans with the bank and told them he expected their

votes. The Subcommittee record is replete with overt economic intimidation designed to interfere with and abridge the rights of Mexican American voters. [H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 16-18 (1975) (citations omitted).]

The House Report concluded that—

[t]he failure of states and local jurisdictions to provide adequate bilingual registration and election materials and assistance undermines the voting rights of non-English-speaking citizens and effectively excludes otherwise qualified voters from participating in elections. [*Id.* at 22.]

The Senate Committee found similar evidence of discrimination and reached similar conclusions.[16] See S. Rep. No. 94-295, 94th Cong., 1st Sess. 25-26, 30 (1975). Congress, following the precedent of the 1965 Act, therefore brought under the special provisions of the Act those States and political subdivisions with low voter participation that had maintained the type of test or device which had played a substantial role in disenfranchising Mexican-Americans, Puerto Ricans and Native Americans—the use of voting materials

[16] Cf. *Graves* v. *Barnes*, 343 F. Supp. 704, 729 (W.D. Tex.), affirmed in relevant part *sub nom. White* v. *Regester*, 412 U.S. 755:

"Because of long-standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others."

which non-English speaking citizens could not understand.

We show in this brief that each of the challenged actions taken by the Director of the Census and the Attorney General was proper. First, there is no provision, express or implied, in the Voting Rights Act, the Administrative Procedure Act, or any other statute, which gave petitioners the right to a hearing prior to the determinations by the Attorney General and the Director of the Bureau of the Census that Texas was subject to the Voting Rights Act. Second, the Director of the Census properly determined the number of citizens of voting age in Texas based on census data available at the time of that decision; his determination is, in any event, not subject to judicial review.

Third, the Director correctly construed the Act to require coverage if less than 50 percent of the citizens of voting age actually voted in 1972; petitioners' contention that coverage depends on a determination that less than 50 percent of the registered voters actually voted is contrary to the explicit legislative history on the point and to this Court's repeated interpretation of the coverage formula. Finally, the Attorney General was required merely to determine whether Texas employed a "test or device" in 1972; he was not required to determine whether such a test or device was employed with discriminatory purpose or effect. Petitioners' contention that there was no discriminatory purpose or effect in English-language elections is relevant only in an action brought in the District Court

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for the District of Columbia under Section 4(d) of the Act to terminate coverage.

In sum, the Director of the Census and the Attorney General have correctly construed the coverage provisions of Section 4 contained in the 1975 expansion of the Voting Rights Act, and have properly implemented the congressional intent that Texas be covered.

ARGUMENT

THE DIRECTOR OF THE CENSUS AND THE ATTORNEY GENERAL PROPERLY CONSTRUED THE COVERAGE FORMULA OF SECTION 4 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED BY PUB. L. 94–73, 42 U.S.C. (AND SUPP. V) 1973B, IN DETERMINING THAT THE STATE OF TEXAS IS SUBJECT TO THAT SECTION

Though petitioners in form attack the 1975 amendments to the Voting Rights Act of 1965, these amendments merely brought Texas under the coverage of the original Act. They did so by expanding the definition of "test or device" to include the use of English-only voting materials in those jurisdictions which have a single-language minority greater than five percent. Petitioners do not challenge the inclusion of English-only elections as a "test or device," and they concede that Spanish-speaking citizens of voting age in Texas exceed five percent of the State's voting age population. Moreover, they admit that as of November 1, 1972—the pertinent date for determining coverage under the 1975 amendments—Texas conducted its elections only in the English language (Pet. 4–5).

The thrust of petitioners' arguments, therefore, is not really directed to the 1975 amendments, but rather to

provisions of the original Voting Rights Act—petitioners discuss the construction of the "50 percent clause" and argue that the Attorney General and the Director of the Census must afford the State a hearing prior to determining whether it is covered by the Act, and that the Attorney General must find, as a prerequisite to coverage, that a state used a test or device with discriminatory purpose or effect.

Nothing in the 1975 amendments or their legislative history suggests any reason why these basic features of the Act should now be interpreted or applied any differently than they have been throughout the Act's 11-year history. Indeed, precisely the contrary conclusion is indicated by Congress' reenactment and expansion of the Act. And, significantly, in extending the Act in 1970 and again in 1975, Congress repeatedly relied on and indicated approval of this Court's decisions construing the Act.[17]

The fundamental purpose behind the structure of Section 4 was to shift from private individuals to the covered jurisdictions the burden of litigating the abridgment of the right to vote on account of race. As the Court explained in *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 327–328:

> Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965. First: the measure prescribes remedies for

[17] See H.R. Rep. No. 397, 91st Cong., 1st Sess. 2–8 (1969); S. Rep. No. 94–295, 94th Cong., 1st Sess. 15–16, 22–24, 34–37 (1975); H.R. Rep. No. 94–196, 94th Cong., 1st Sess. 8–9, 13–15, 26, 28–29, 32–33 (1975).

voting discrimination which go into effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. See *Katzenbach* v. *McClung,* 379 U.S. 294, 302–304; *United States* v. *Darby,* 312 U.S. 100, 120–121. Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

Section 4(b) of the Voting Rights Act of 1965 is central to the congressional scheme for avoiding delay in enforcement and shifting the burden to covered jurisdictions. In addition to establishing coverage criteria and mechanisms, that subsection provides:

> A determination or certification of the Attorney General or of the Director of the Census under this section * * * shall not be reviewable in any court * * *.[18]

Although the courts below held that this provision did not divest them of "narrow" jurisdiction to determine whether the Executive defendants applied the law in a manner consistent with the statutory language and

[18] This clause was held constitutional in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 332–333.

congressional intent, both courts emphasized that their jurisdiction was sharply limited.[19]

The courts below correctly ruled that the federal parties had interpreted Section 4 of the Voting Rights Act in a manner which comported with the plain meaning of the statute, with the legislative history, and with the relevant case law (approved by Congress in twice extending the Act).[20]

A. TEXAS IS NOT ENTITLED TO A HEARING BEFORE THE DIRECTOR OF THE CENSUS AND THE ATTORNEY GENERAL REGARDING THE DETERMINATIONS MADE UNDER SECTION 4(B) OF THE VOTING RIGHTS ACT

Petitioners argue that they are entitled to some form of an administrative hearing prior to being subjected to coverage under the Voting Rights Act (Pet.

[19] The district court noted that (Pet. App. B–4, B–7):

"This is not a review of the computations made by the Director of Census following publication but is an examination prior to publication inquiring into whether or not the Bureau of Census or the Director of Census has properly applied the Act.

* * * * *

"There are protections in the Act. The Attorney General must bring enforcement proceedings where defenses are available. There is also under certain circumstances available remedies under the so-called bail-out provisions of the statute. But the first step is a step that a court cannot review except as I have here done to determine that the Director of Census has not acted in an arbitrary or illegal manner but rather that he has proceeded in a rational manner, consistent with the apparent meaning of the statute and that his interpretations of it at this stage must be sustained."

The court of appeals affirmed this interpretation of the court's jurisdictional authority (Pet. App. A–12; A–22 to A–24). Both courts also noted their lack of jurisdiction to rule on any constitutional issues (Pet. App. B–2, A–13). See note 10, *supra*.

[20] A similar issue, as to Section 5 of the Act, is presented in *Morris* v. *Gressette*, No. 75–1583, probable jurisdiction noted December 6, 1976.

Br. 18–21). However, petitioners cite no statutory or regulatory authority to support the proposition. The Voting Rights Act itself imposes no such requirement, and, as both courts below noted, the Administrative Procedure Act does not afford a hearing under these circumstances.[21] Petitioners do not dispute either of these conclusions. Nor does anything in the legislative history of the Voting Rights Act suggest that Congress intended jurisdictions potentially subject to the coverage formula of Section 4 to be afforded a hearing (see Pet. App. A–14 to A–15).

Moreover, as the court of appeals stated, a right to an administrative hearing regarding application of the coverage formula of Section 4 would be so inconsistent with the purposes of the Act "as to compel the conclusion that a predetermination hearing cannot be implied from the terms of the statute" (Pet. App. A–15 to A–16). As previously noted, the determinations of the Director of the Census and the Attorney General serve to screen out initially from the coverage of the special provisions of the Act those states and

[21] See Pet. App. B–5. The court of appeals held (Pet. App. A–12 to A–13 n. 28) that—

"* * * it appears that the type of "hearing" [petitioners] seek is the trial-type hearing detailed by sections 7 and 8 of the APA, 5 U.S.C. §§ 556, 557 (1970), which includes an opportunity to cross-examine and to know and meet the opposing evidence. A trial-type hearing before an agency is most appropriate where, as here, there are disputed issues of fact to be resolved. * * *

"Hearings under sections 7 and 8 however, are required *only* when either rulemaking or adjudications are required by statute to be 'on the record after opportunity for an agency hearing,' 5 U.S.C. §§ 553, 554 (1970). The Voting Rights Act contains no such requirement."

political subdivisions where a pattern of voting discrimination is not suggested by the statistics and by the past use of a test or device. Petitioners argue that "some opportunity to demonstrate noncoverage" and "[s]ome means * * * to challenge the interpretations of the Act" must be provided for this purpose (Pet. Br. 20). In fact, an opportunity for a hearing is provided, but, in order to assure prompt vindication of voting rights, it follows, rather than precedes, the administrative determinations of the Attorney General and the Director of the Census.

Congress in Section 4(a) provided for a post-determination judicial hearing in which any state or subdivision can seek to terminate coverage under the Act by showing that it has not used a test or device with discriminatory purpose or effect. It is true that such a hearing puts the burden of proving nondiscrimination on the state. But this Court has ruled this burden "quite bearable," considering that the state need only submit affidavits of nondiscrimination and then "refute whatever evidence to the contrary may be adduced by the Federal Government," and that the relevant evidence of discrimination is "peculiarly within the knowledge of the States and political subdivisions themselves." *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 332.[22] It is the means chosen by Con-

[22] Thus far 3 states and 21 political subdivisions have been determined to be covered under the 1975 amendments to Section 4 of the Voting Rights Act. 40 Fed. Reg. 43746, 49422; 41 Fed. Reg. 783, 34329. Three of those political subdivisions have since terminated coverage. *State of New Mexico* v. *United States*, D.D.C., Civil Action No. 75–2125, decided September 17, 1976.

gress "to shift the advantage of time and inertia" (*id.* at 328) to the victims of voting discrimination.

Moreover, as the record below demonstrates, and as petitioners concede, the Secretary of State of Texas was invited to meet with officials of the Census Bureau, and to present evidence regarding the coverage of Texas under Section 4 (see pp. 5–6, *supra*). As the court of appeals concluded, "the State of Texas was afforded a participation in the decision-making process under the Voting Rights Act greater then the statute requires" (Pet. App. A–17).

B. THE DIRECTOR OF THE CENSUS PROPERLY CONSTRUED SECTION 4(B) IN DETERMINING THE NUMBER OF CITIZENS OF VOTING AGE IN TEXAS

Section 4(b) of the amended Voting Rights Act requires, as one condition to coverage, that the Director of the Census determine that "less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of 1972." Petitioners claim that the Director of the Census used inaccurate data in counting the number of aliens in Texas and as a result erroneously concluded that Texas fell within the mathematical coverage formula of Section 4 (Pet. Br. 22–26). However, the Director used the data Congress intended him to use—the census figures—which are much more reliable than the conjectures presented by the petitioners (see *e.g.*, Pet. Br. 25).

Petitioners argue that "the manner of excluding aliens" from the gross "persons of voting age" figures "present[s] a strong suggestion of administrative irrationality and capriciousness" (Pet. Br. 23). From that premise petitioners ask this Court to do precisely what Congress in Section 4(b) has forbidden this or any other court to do—"to review * * * objective statistical determinations" by the Census Bureau. *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 332–333. This Court there upheld the Act's limitation of judicial review against South Carolina's argument that it would allow arbitrary imposition of the Act's provisions, and petitioners' guesses, estimates and possibilities as to population show the wisdom of Congress in prohibiting judicial review of Census figures in this context.

Even meeting petitioners on their own terms, however, they have fallen far short of showing the invalidity of the Director's determinations. In order to make the required determination with regard to Texas, the Census Bureau updated to November 1, 1972 the 1970 census figures for the population 18 years of age and over [23] and then subtracted from that

[23] As Congress knew (see, *e.g.* 121 Cong. Rec. H4889 (daily ed., June 4, 1975)) (Remarks of Cong. Badillo, a sponsor of the 1975 amendments), it is impossible for anyone to count in 1975 the precise number of persons who were in a jurisdiction in 1972. It is therefore necessary to use estimates. The number of persons in the State of Texas 18 years of age and over in 1970 was derived by tabulation of data contained in Questions 5–7 of the U.S. Census Questionnaire, which records the age of every person in each house-

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figure the number of persons counted in the Census who were aliens of voting age.[24] It then divided the total number of 1972 votes cast in Texas by this figure, which gave a percentage of 46.2 (A. 156).[25]

Petitioners argue that the Director of the Census mistakenly undercounted or underestimated many aliens residing in Texas, and that therefore the 140,657 aliens of voting age the Director excluded from his total count of persons of voting age [26] is unreasonably low, making the figure arrived at for citizens of voting age too high (Pet. Br. 23–26). Petitioners conclude that had the Director of the Census used more accurate data regarding aliens, Texas would not have

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hold (A. 156–1f7). Estimates of the November 1, 1972 population were made by interpolating between estimates of the July 1, 1972 and July 1, 1973 population. The latter estimates were derived by averaging the results of two statistical methods which use current data to estimate change in the total population. These standard Census Bureau procedures are explained in detail in United States Bureau of the Census, Current Population Reports, P–25, No. 520, "Estimates of the Population of States with Components of Change, 1970 to 1973," July 1974, pp. 7–17 (A. 181–191).

Estimates of the November 1, 1972, population under 18 years of age were computed in a manner consistent with the estimate of total population and then subtracted from the total population estimates to obtain the voting age population estimates (A. 157).

[24] The alien population in Texas was derived from the 1970 census by combining the results of Questions 13a ("where was this person born") and 16a ("for persons born in a foreign country—is this person naturalized?") in the 5 percent sample forms of the April 1970 Census Questionnaire (A. 157). In other words, those persons who, in responding to the Census Questionnaire, identified themselves as aliens were so counted for purposes of subtracting aliens from the total voting age population.

[25] For table, see p. 7, *supra*.

[26] See p. 7, *supra*.

been covered by Section 4 because it would have been determined that more than 50 percent of the citizens of voting age voted in 1972 (Pet. Br. 26). Both courts below correctly rejected this argument.

In the first place, petitioners miss the point when they argue that the Director of the Census erroneously ignored estimates of the Immigration and Naturalization Service which, petitioners assert, would place Texas outside the formula of Section 4 coverage if used in place of the Census' estimates (Pet. Br. 24–26). In ordering the Director of the Census to determine whether less than 50 percent of the citizens of voting age in Texas voted in November 1972, Congress entrusted to the Director the discretion to rely on the data available to him. As the court of appeals noted (Pet. App. A–21), Congress chose "to specify one particular source for all the figures to be used, to insure quick availability and consistency." Petitioners cite no legislative history to the contrary, and there is ample historical indication that the court's conclusion was intended by Congress—and, indeed, that Congress was itself looking to Census data in anticipating that Texas would be covered by the 1975 amendments. H.R. Rep. No. 94–196, 94th Cong., 1st Sess. 20 n. 22, 22 nn. 30–32, 23, 30 nn. 44–45 (1975); S. Rep. No. 94–295, 94th Cong., 1st Sess. 24 n. 14, 28 n. 18, 30 nn. 26–28, 31, 38 (1975).

Congress debated in 1965 whether to use Census figures for the purpose of the coverage formula in Section 4(b). During the Senate hearings on the 1965 Act, use of Civil Rights Commission figures was con-

sidered and rejected. See Hearings on S. 1564, "Voting Rights," before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., part 1, 596 (1965). Supporters of the Voting Rights Act supported the use of census figures as the "best available." 111 Cong. Rec. 11470 (1965) (remarks of Senator Tydings). Senator Mansfield stated (111 Cong. Rec. 8298 (1965)):

> Inasmuch as we appropriate money every so often to the Census Bureau for the taking of the census, I believe we much have some faith in the credibility of the Census Bureau. If not, we are wasting money in maintaining that division of the Government.

In any event, petitioners' unpersuasive attempts to demonstrate that there are other, more reliable, estimates of the number of aliens in Texas in 1972 lend support to, rather than undermine, the decision of the Director of the Census to rely upon the data gathered by the Census itself.

Before addressing the specific difficulties with petitioners' figures, it is necessary to put the issue in perspective. Undoubtedly there were some illegal aliens in Texas who did not step forward to be counted in the 1970 Census. Whether there were one hundred or one million such aliens, however, is wholly irrelevant. Each one counted would have increased both the "voting age population" figure and the "aliens of voting age" figure by one. When the latter figure is subtracted from the former, the resulting "citizens of voting

age"—the critical figure for Section 4 purposes—would still be 7,514,343 and thus the voting participation would still be 46.2 percent. The same result holds for untabulated legal aliens. Therefore, the number of aliens the Census may have missed in 1970 has no effect whatever on the conclusion that only 46.2 percent of citizens of voting age actually voted in 1972.

Petitioners could impeach the validity of the Director's conclusion—if they had a right under the Voting Rights Act to do so, which they do not—only by showing that some of the 7,514,343 "citizens" counted by the Census are actually aliens. Furthermore, petitioners would have to show that the Census misidentified at least 568,915 aliens as citizens;[27] otherwise the percentage of citizens of voting age voting would still be less than 50 percent and Texas would still be covered by the Act.

Petitioners begin this argument by asserting that "209,912 illegal aliens were *deported*[28] from Texas in 1972" (Pet. Br. 24) (emphasis added). However, as the court of appeals noted, the source relied upon by petitioners shows no such figure; it does show that "only 16,266 aliens were deported from the *entire* United States during the year ending June 30, 1972"

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[27] There were 3,472,714 votes cast in 1972. That figure is 50 percent of 6,945,428. There were, according to the Census, 7,514,343 citizens of voting age in 1972. The difference between the two latter figures is 568,915.

[28] In the calculations on p. 25 of their brief, petitioners indicate that the 209,912 figure represents illegal aliens apprehended. However, no source for this figure or its characterization is given beyond that discussed in the text.

(Pet. App. A–19 n. 40). The court of appeals also criticized the 209,912 figure because (Pet. App. A–19).

> * * * there is no indication of how many of these [deported aliens] were of voting age; nor is there any correction made for individuals who might have been deported two or more times; nor does this tell us how many were residing in the state on November 1, 1972.

Petitioners have attempted to respond to the court's second concern by subtracting 50,000 "which it may be estimated * * * were apprehended twice" (Pet. Br. 25) from the 209,912 "illegal aliens apprehended" (*ibid.*). However, petitioners make no attempt to explain how they reached their estimate of 50,000, and give no source for that number.

Next, petitioners conclude that 673,400 unapprehended illegal aliens were living in Texas in 1972. In coming to that figure they start with the estimate that there were 2,693,600 "illegal Mexican nationals who went undetected in the United States in the year 1972" (Pet. Br. 24). That is the estimate reached in a study published on October 15, 1975, which, as the court of appeals noted, was after the date upon which the Director of the Census published his determinations regarding Texas (Pet. App. A–20). Although petitioners without source citation or other explanation estimate that one fourth of this estimate, or 673,400 Mexican nationals were living in Texas in 1972, they do not indicate the age of these persons and fail to tell the number who resided in the State on November 1, 1972. Thus, petitioners' "more-than-

reasonable" alternative to the Director's computation of the number of citizens of voting age residing in Texas on November 1, 1972, is nothing more than a chain of unsupported guesses and estimates of estimates, strung together from a variety of sources, named and unnamed.[29] Faced with such an alternative, it is not surprising that the Director of the Census chose to rely upon his own estimates—as Congress intended that he would.[30]

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[29] Petitioners argue that 920,979 (their estimate of the number of aliens residing in Texas in 1972) should be subtracted from the Census Bureau's count of 7,655,000 persons of voting age residing in Texas on November 1, 1972, rather than the 140,657 which the Director of the Census subtracted (Pet. Br. 25). Petitioners apparently assume (Pet. Br. 24–25) that most aliens in Texas are of Spanish heritage. Thus, if petitioners' arithmetic is to be used, the Director of the Census improperly counted 780,322 (920,979 minus 140,657) aliens of Spanish heritage as citizens. The Director of the Census has determined, pursuant to his duties under Section 4(b) of the Act, that in 1972 there were 860,553 citizens of Spanish heritage of voting age in Texas. If petitioners' proposed estimates were correct, then more than 90 percent of all persons of Spanish heritage and of voting age in Texas in 1972 were aliens. Such a result strains credulity; the courts below understated the matter in holding that petitioners had failed to support their contention (Pet. App. A–21). In addition, even if petitioners' conjectures as to the number of illegal aliens in Texas were assumed to be correct, it would then be just as logical—and more credible—to assume that the total voting age population figure for Texas (7,655,000) was also understated.

[30] As the court of appeals noted, "[t]he efforts by appellants to correct the source figures to meet some of the criticisms made above—*e.g.*, that certain statistics do not take into account the possibility that some aliens might have been deported more than once—only compound the uncertainties in the final figure" (Pet. App. A–21).

In light of the foregoing, there is no reason to conclude that the Director of the Census acted irrationally or capriciously in relying upon Census data in making the determinations required of him by the Voting Rights Act.

C. THE DIRECTOR OF THE CENSUS CORRECTLY DETERMINED THAT LESS THAN 50 PERCENT OF THE CITIZENS OF VOTING AGE IN TEXAS VOTED IN 1972

Petitioners also challenge (Pet. Br. 8–13) the Director of the Census' interpretation of the portion of Section 4 which requires him to determine, as a condition of coverage,

> * * * that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per-centum of such persons voted in the Presidential election of November 1972.

The Director of the Census has consistently interpreted the term "such persons" in the second clause to refer back to "citizens of voting age" in the first clause. Under this construction of that provision and similar portions of Section 4, a state comes within the voting-participation aspect of the coverage formula if either of two conditions is met: (1) less than half its total citizens of voting age were registered, or (2) less than half of its total citizens of voting age voted (Pet. App. A–24).

Petitioners contend (Pet. Br. 9) that this construction makes the first clause meaningless, because no jurisdiction could ever be covered by the first clause

without being covered by the second (at least where registration is a mandatory prerequisite for voting). They urge therefore that the second clause refers not to less than half the state's voting age citizens voting, but to less than half the state's registered voters voting.

Whatever force this contention might have as a purely textual argument,[31] it must yield in the face of uncontroverted legislative history and unanimous interpretation of the coverage formula by this Court, which conclusively demonstrate that the Director's interpretation is correct.

1. Legislative history of the 1965 Act

The Voting Rights Act coverage formula proposed by the Johnson Administration and adopted in 1965 is very similar to the one which was adopted in 1975. Senator Edward M. Kennedy questioned Attorney General Katzenbach [32] during the 1965 Senate hearings

[31] In testimony before the Senate in 1965, however, A. Ross Eckler, then Acting Director of the Census, testified that, under his interpretion, "it is not necessary for us to undertake the assembly of information on registration." Subsequently, Senator Ervin said, "So we might as well for all practical purposes strike that provision out of the act" (Pet. App. A–30, A–32 to A–33).

[32] In construing the Voting Rights Act, this Court has often looked to Attorney General Katzenbach's testimony for authoritative guidance as to legislative intent. See, *e.g.*, *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 n. 31, 567–568; *Gaston County* v. *United States*, 395 U.S. 285, 289–290; *Perkins* v. *Matthews*, 400 U.S. 379, 387–388 and n. 7; *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, No. 75–104, decided March 1, 1977, slip op. 12–13.

regarding the meaning of "such persons" in the coverage formula, as follows (Hearings on S. 1564, "Voting Rights," before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., part 1, 162 (1965)):

> Senator KENNEDY. Touching on an area where there might be some ambiguity, section 3(a)(2) states that the Director of Census is to determine "that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964." Pertaining to the last clause of that language * * * does the term "such persons," refer to people in the State who were registered to vote, or people in the State of voting age?
>
> Attorney General KATZENBACH. Persons in the State of voting age residing therein, Senator, not those registered. Presumably, normally, people have to be registered to vote. But the reference here would be simply to persons residing therein of voting age.

This construction is also indicated by the testimony, which the court below quoted at length (Pet. App. A–29 to A–33), of A. Ross Eckler, Acting Director of the Census, Hearings on S. 1564, *supra*, at 599–601. The trigger formula was given the same interpretation on the floor of the Senate (111 Cong. Rec. 11079 (1965)) (remarks of Sen. Eastland):

> Because it seems unlikely, if not impossible, that a person could vote in the November 1964 presidential election who was not registered on November 1, 1964, for practical purposes, the criterion is that a State will have its voter qualification tests suspended if * * * less than half of them voted in the 1964 presidential election.

As the court of appeals further noted, many Senators and Congressmen, throughout the debates on the 1965 Act, interpreted the coverage formula in the same manner (Pet. App. A–35 n. 65).

Moreover, as the court below indicated (Pet. App. A–26 and n. 54), if petitioners' interpretation of this provision had been employed in 1965, many states that the Act was specifically intended to reach would have been excluded from coverage.[35] In addition, under petitioners' proposed construction, a jurisdiction in which 50 percent of the citizens of voting age were registered, and in which 50 percent of the registered voters voted—*i.e.*, 75 percent of the citizens of voting age did *not* vote—would not be covered by the Act.

2. Interpretation by this Court

The Director's interpretation of this portion of the coverage formula is also the settled interpretation by this Court of the formula.

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[35] Petitioners' proposed construction would have excluded the States of Georgia, Louisiana, and South Carolina from the coverage of the Act. This Court explicitly noted the Congress' contrary intention with respect to these three States (*South Carolina* v. *Katzenbach*, *supra*, 385 U.S. at 330). As the court of appeals stated, "[s]imilarly, the Congress clearly contemplated that Texas would be covered by the 1975 Amendments" (Pet. App. A–26 to A–27 and n. 54).

In *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 317 the Court stated that—

> * * * the Director of the Census has determined that less than 50% of [South Carolina's] voting-age residents were registered on November 1, 1964, or voted in the presidential election of November 1964.

This Court used similar language in *Gaston County* v. *United States,* 395 U.S. 285, 286:

> The Voting Rights Act of 1965 suspends the use of any test or device as a prerequisite to registering to vote in any election, in any State or political subdivision which, on November 1, 1964, maintained a test or device, and in which less than 50% of the residents of voting age were registered on that date or voted in the 1964 presidential election.

In *Georgia* v. *United States,* 411 U.S. 526, 528 n. 1, this Court defined "Covered States" as "those in which less than 50% of eligible voters were registered to vote or actually voted." And, as recently as this Term, the Court noted that certain counties in New York were covered by the Act by virtue of the Director's determination that "fewer than 50% of the voting-age residents of these three counties voted in the presidential elections of 1968." *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* No. 75–104, decided March 1, 1977, slip op. 2.

3. 1975 Legislative history

Finally, this interpretation of the coverage formula was specifically reapproved in the course of the adoption of the 1975 amendments. As Congressman Badillo explained (121 Cong. Rec. H4737 (daily ed., June 2, 1975)):

> We sought to maintain precisely the same structure that presently exists in the act, and that is the reason that in title II the trigger mechanism that is retained is identical to the mechanism in the 1965 act. That is the principle that the jurisdictions to be covered will be those where less than 50 percent of the persons of voting age were registered to vote or actually voted.[34]

See also S. Rep. No. 94–295, 94th Cong., 1st Sess. 46, 66(1975); H.R. Rep. No. 94–196, 94th Cong., 1st Sess. 62–63(1975).

The legislative history and this Court's decisions thus specifically refute petitioner's argument on this point.[35]

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[34] "Persons" was later changed to "citizens". See 121 Cong. Rec. H4884–4893 (daily ed., June 4, 1975).

[35] Petitioners also argue (Pet. Br. 21–22) that the Director of the Census arbitrarily defined "persons of Spanish heritage" in determining that greater than 5 percent of the citizens of voting age in Texas "are members of a single language minority." 42 U.S.C. (Supp. v) 1973b(b), 1973*l*(c)(1). Although petitioners raised this issue in the district court (A. 136–137), they did not raise it in the court of appeals and that court, noting petitioners' failure to raise the issue, expressed no opinion on it (Pet. App. A–17 n. 36). Nor did petitioners mention the issue in their petition. Therefore it is not appropriately raised at this stage of the proceedings. In any event, the definition of "Spanish heritage" employed by the Director of the Census is precisely that which Congress intended the Director to use. See S. Rep. No. 94–295, 94th Cong., 1st Sess. 24(1975); 121 Cong. Rec. H4716 (daily ed., June 2, 1975) (remarks of Cong. Edwards); 121 Cong. Rec. S13407 (daily ed., July 23, 1975) (remarks of Sen. Tunney).

D. THE ATTORNEY GENERAL PROPERLY REFUSED TO CONSIDER SECTION 4(d) OF THE VOTING RIGHTS ACT WHEN MAKING HIS SECTION 4(b) DETERMINATIONS

Petitioners argue (Pet. Br. 13–17) that the Attorney General erred in refusing to apply Section 4(d) of the Voting Rights Act when making his determination that the State of Texas is covered by Section 4. Petitioners have quoted Section 4(d) out of context (Pet. Br. 14–15), and fail to show that it is to be applied in the manner they suggest.

Section 4(d) of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. (Supp. V) 1973(d), provides in full that (emphasis supplied):

> (d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices *for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section (f)(2)* of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

Petitioners argue, contrary to the plain meaning of the Section and its legislative history, that the Attorney General must determine whether Section 4(d) is applicable to the State of Texas prior to his

making the determination required by Section 4(b) that the State has employed a "test or device."

For purposes of making his determination as to coverage under Section 4(b), however, the Attorney General is required only to determine whether a test or device within the meaning of the Act existed at a particular time in a particular jurisdiction. Section 4(d) does not require, for purposes of the Attorney General's determination, that he evaluate a particular test or device to determine whether it has had a discriminatory purpose or effect. Rather he is to engage in "a routine analysis of state statutes," *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 301, and in the case of the 1975 amendments, election procedures and materials, to determine if they constitute a test or device.

Section 4(d) is applicable only to a suit brought by a jurisdiction covered by Section 4 to *terminate* such coverage. Section 4(a) in pertinent part provides that a jurisdiction covered by Section 4 can seek termination of coverage by bringing suit for a declaratory judgment in the United States District Court for the District of Columbia and proving that it has not used a test or device as defined by the Act for a stated period of time with the purpose or the effect of denying or abridging the right to vote on account of race or color or on account of membership in a language minority group. It is only at this point that Section 4(d) becomes relevant. In

South Carolina v. *Katzenbach, supra,* 383 U.S. at 332 (emphasis added), this Court described the operation of Section 4(d):

> Section 4(d) further assures that an area need not disprove each isolated instance of voting discrimination *in order to obtain relief in the termination proceedings.*

Again, in *Gaston County* v. *United States,* 395 U.S. 285, 286–287 (footnotes omitted), the Court explained the operation of Section 4:

> The Voting Rights Act of 1965 suspends the use of any test or device as a prerequisite to registering to vote in any election, in any State or political subdivision which, on November 1, 1964, maintained a test or device, and in which less than 50% of the residents of voting age were registered on that date or voted in the 1964 presidential election. Suspension is automatic upon publication in the Federal Register of determinations by the Attorney General and the Director of the Census, respectively, that these conditions apply to a particular governmental unit. If the unit wishes to reinstate the test or device, it must bring suit against the Government in a three-judge district court in the District of Columbia and prove "that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color," § 4(a). The constitutionality of these provisions was upheld in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966).

This interpretation was reiterated this Term in *United Jewish Organizations, supra,* slip op. 11 (emphasis added):

> Under § 4, a State became subject to § 5 whenever it was administratively determined that certain conditions which experience had proved were indicative of racial discrimination in voting had existed in the area—in the case of New York, * * * that a literacy test was in use in certain counties in 1968 and that fewer than 50% of the voting age residents in these counties voted in the presidential election that year. At that point, New York could have escaped coverage by undertaking to demonstrate *to the appropriate court* that the test had not been used to discriminate within the past 10 years, an effort New York unsuccessfully made.

The legislative history of Section 4(d) also indicates that Congress intended that it apply, not at the determination stage, but in suits brought to terminate coverage, after the determination of coverage has been made. The House Committee Report in 1965 states the intended purpose of Section 4(d):

> This subsection clarifies the burden of proof required of a State or political subdivision *to resume use of tests or devices in those situations where resumption would not be precluded because of subsection 4(a).* This subsection provides that a State or political subdivision, not barred from relief under the proviso to subsection 4(a), shall not be determined to have engaged in the use or tests or devices for the

> purpose or with the effect of denying or abridging the right to vote on account of race or color if [the jurisdiction can prove that the three subparts of § 4(d) apply]. A promise not to violate the law would not meet the test of this subsection. [H.R. Rep. No. 439, 89th Cong., 1st Sess. 26 (1965), emphasis added.]

Thus, petitioners' argument that the Attorney General must take Section 4(d) into account when making his Section 4(b) determinations is contrary to the statutory language, to the legislative history, and to this Court's decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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